Supreme Court, U.S.
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No. 98-167

In The
Supreme Court of the United States
October Term 1998

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Jane Dee Hull, Governor of Arizona; Grant Woods, Attorney General of Arizona; Armando Ruiz; Linda Aguirre; John Philip Evans; Rosie Garcia; Candido Mercado; Manuel Pena, Jr.; Peter Rios, Jr.; Macario Saldate IV; Federico Sanchez; and Victor Soltero
Respondents

On Petition for A Writ of Certiorari to the Supreme Court of the State of Arizona

Reply to Opposition to PETITION for Writ of Certiorari

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I. PETITIONERS HAVE STANDING TO MAINTAIN THIS ACTION.

Respondents ask the Court to deny the Petition because Petitioners Arizonans for Official English and Robert Park (together "AOE") do not have standing to maintain it. State Respondents' Brief in Opposition to Petition for Writ of Certiorari ("State Opp."), 1;[1] Private Respondents' Opposition to Petition ("Private Opp."), 3, n. 3. These requests should be denied and the Petition granted because:

- A) the circumstances which led the Court to question Petitioners' standing in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1068 (1997) ("*AOE I*"), no longer apply; and,
- B) Petitioners have standing under this Court's decisions and Arizona law.

A) Petitioners Have Suffered Cognizable Injury As Defined in *Arizonans for Official English I*.

Petitioners' standing was challenged in *AOE I* because:

> As nonparties in the District Court, AOE's members were not bound by the judgment for Yniguez. That judgment had slim precedential effect . . . and it left AOE entirely free to invoke Article XXVIII, § 4, the citizen suit provision, in state court, where AOE could pursue whatever relief state law authorized.

117 S.Ct. at 1068.

None of those conditions are still true. Petitioners AOE

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[1]Respondents argued in *AOE I* that Petitioners did not have standing because they retained the right to sue in state court. *See, e.g.*, Brief for Respondents In Opposition to the Judgment, in *AOE I*, No. 95-974, 31. Now they argue that despite being bound in state court as well, Petitioners still have not suffered a cognizable injury. State Opp. 15.

and Park were parties throughout the state court proceedings; in fact, AOE and Park were the "primary litigating defendants" throughout this process. Pet. App. 55a.

As the State Respondents note, the judgment of the Arizona Supreme Court is binding on AOE, and prohibits AOE from invoking the citizen suit provision in state court: "Petitioners are bound by the Arizona Supreme Court decision and therefore precluded from bringing a private enforcement action pursuant to Section 4 of Art. XXVIII." State Opp., 13.

The invasion of a right to sue is well-recognized by this Court as sufficient for standing. For example, in *Primate Protection League v. Tulane Ed. Fund*, 500 U.S. 72, 77 (1991), the Court noted that "[p]etitioners' injury is clear, for they have lost the right to sue in Louisiana court - the forum of their choice." Similarly, the adverseness necessary for standing "is supplied not by petitioners' claims for the monkeys' protection, but rather by petitioners' desire to prosecute their claims in state court." 500 U.S. at 79.

Here Petitioners wish to prosecute their claims in Arizona state court, but cannot do so, solely because of an erroneous interpretation of federal law by the lower court. This loss of rights has an immediate impact on Petitioners. For example, Petitioners wish to sue the state over its failure to teach English to Arizona's children.[2] Park,

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[2]*See, e.g.*, Navarrette, "Bilingual Classes' Success Debated: Classes effective for only 2.8% of students," *The Arizona Republic*, June 4, 1998, A1 ("Fewer than 3% of students in Arizona's bilingual education classes are gaining the skills necessary to join students in mainstream classes, according to a report the Arizona Department of Education will release later this month."). Arizona's bilingual education failure rate is higher than that which caused

"Bilingual education is, in fact, illegal," *The* [Scottsdale, Ariz.] *Tribune*, August 20, 1998, A13 ("Arizona's law had ending bilingual education as one of its primary goals.").

Art. XXVIII's citizen suit provision would have given Petitioners an absolute right to challenge this failed policy. *Id.* It is important for Petitioners to have this right to sue directly, both because AOE's ability to sue under Ariz. Const. Art. XX, § 7 (schools conducted in English), is uncertain, and because parents and students who have challenged bilingual education programs have been harassed. *See, e.g., Carbajal v. Albuquerque Public School Dist.*, Civ. 98-0279-MVDIS (D. N.M. 1998) (protection sought after retaliation against students challenging schools' bilingual education policy).

Now, however, Petitioners and aggrieved parents who want their children to learn English must undertake another initiative. And this new initiative could be ignored by state officials, in an endless cycle.

Petitioners' injuries are immediate and concrete, rather than "abstract" as Respondents suggest. Thus, the Court's earlier concern about standing has been ameliorated in this proceeding.

B) Petitioners Have Standing Under This Court's Decisions and Arizona Law.

Respondents contend that Petitioners have suffered no injury, or that any injury is so general and indistinct that it can be ignored. Neither point is well-taken. Even leaving

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California's voters to largely eliminate bilingual education. *Id.*; *Valeria G. v. Wilson*, 12 F. Supp.2d 1007 (N.D. Calif. 1998) (refusing preliminary injunction against initiative because English language instruction was valid teaching method).

aside all the reasons for standing discussed in *AOE I*, *see, e.g.*, Reply Brief for Petitioners in No. 95-974, 13-18, AOE and Park have standing to maintain this case.

As noted above, this Court recognized the invasion of a choice of forum right as sufficient for standing in *Primate Protection League*. 500 U.S. at 77. This point is also made in *Diamond v. Charles*, 476 U.S. 54 (1986), where a doctor was found not to have standing to defend the constitutionality of a state abortion statute. In a footnote, this Court recognized that the invasion of statutorily-created rights could sustain standing to defend the constitutionality of a challenged state statute. 476 U.S. at 65, n. 17 ("The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met."). To suggest, as Respondents do, Priv. Opp. 3, n.3, State Opp. 15, n. 9, some distinction between state-created and "federal" rights for purposes of standing would conflict with this statement in *Diamond v. Charles*.

Even Respondents' citation to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992), as claiming that a state cannot create general individual statutory rights which are vindicable in the federal courts, State Opp. 14-15, is an overstatement. *See, e.g.*, 504 U.S. at 578 (recognizing statutory rights). Justice O'Connor and two other Justices, concurring and citing *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983), anticipated this argument in *Diamond v. Charles* by noting that if the doctor had been a "proper party" in the court below, he could have maintained his case in this Court. In that case, however, "he asserts no actual, present interest that would **permit him to sue or be sued** by appellees, or the State of Illinois, or anyone else, in an action sharing common

questions of law or fact with those at issue in this litigation." *Diamond*, 476 U.S. at 77 (O'Connor, J., concurring) (emphasis added).

Petitioners had just such a right "to sue" the State in state court before the lower court decision, and have no such right today, solely as a result of the lower court decision. The citizen suit provision was included in Art. XXVIII precisely because the state was thought to be unwilling to actively enforce the new law - a concern recognized by the Ninth Circuit earlier in these proceedings. *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991) ("[A]s appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative."). The concern was well-grounded in fact, as the Governor, Attorney General and even the Council on Judicial Administration had all opposed the initiative. *See, e.g., id.*, and Petition, 10, n. 5; *LULAC v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997)(comparing California officials' enthusiasm for initiative with unwillingness of Arizona officials here).

Nor are the State Respondents' arguments about AOE's "general" injury convincing in light of this Court's recent jurisprudence. This type of citizen-standing right is well-recognized in Arizona, where "[c]itizens of the state may act for the benefit of the state as a whole." *Kadish v. Arizona State Land Dept.*, 747 P.2d 1183, 1197 (Ariz. 1987), *aff'd, ASARCO v. Kadish*, 490 U.S. 605 (1989); *Arnold v. Arizona Dept of Health Services*, 775 P.2d 521, 537 (Ariz. 1989).

As this Court noted in *Public Citizen v. Dept. of Justice*, 491 U.S. 440 (1989), the fact that many other citizens could sue upon being denied the same rights does not diminish the standing conferred by a petitioner's actual loss of a statutory

right. 491 U.S. at 449-50 ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue."). The difference which Respondents overlook is between an abstract injury and a concrete injury suffered by one who has lobbied for passage of a particular right in its favor, used the right, intended to use the right again, and has then lost that right to governmental action. *Clinton v. City of New York*, 118 S.Ct. 2091 (1998)(recognizing standing because complainant lobbied for a measure which was vetoed).

Whether or not other citizens could also invoke the citizen standing provision, Petitioners themselves are particularly bound by the lower court decision, and thus have lost a specific legal right intended to give them specific powers which they had used and were intending to use again. That is enough to give these Petitioners standing.

II. The Court Should Not Wait For Another Case to Consider These Important Constitutional Issues.

Respondents also suggest that "this case presents a particularly unsuitable vehicle for resolving the complicated First Amendment issues presented by Petitioners." State Opp. 15; Private Opp. 29. Oddly, this recommendation is supported by assertions both that "constitutional questions are inherent in the English-only concept . . . state constitutional issues will continue to influence the political discourse[,]" and that "premature review" won't provide "any substantial, corresponding benefit to the political

process." State Opp. 16, n. 10. These assertions are internally contradictory, and defy the reality of both the lower court decision and the political debate surrounding state choices of what language to use for internal activities.

The Arizona Supreme Court decision was based entirely on **federal** constitutional issues. There were no "state constitutional issues" in this or any other political debate over the language of government. Nor could there be in this case, since Art. XXVIII is itself an amendment to the Arizona Constitution.

This Court has a special responsibility when state courts misinterpret federal law in their consideration of state laws. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152-53 (1984); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In *United Airlines v. Mahin*, 410 U.S. 623 (1973), for example, the Court sent a case back to a state court "to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.'" 410 U.S. at 632, *quoting, Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952). Respondents' plea for inactivity would violate that responsibility to insure that state courts are fully informed about the correct understanding of this Court's decisions. So, too, the political process should not be distorted by supposedly authoritative but actually erroneous judicial descriptions of this Court's teachings.

Similarly, Respondents' plea ignores the effect the lower court decision has already had. At least one District Court has relied on the decision below to require a state government to use a language other than English to give drivers' license examinations. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala., 1998), *appeal filed*, July 23,

1998, No. 98-6598 (11th Cir.).[3]

In addition, contrary to the assertion that Art. XXVIII is a "uniquely restrictive state enactment," Private Opp. 29, Art. XXVIII is not the most detailed or restrictive official English statute. For example, voters in Alaska just adopted a new Official English initiative by a margin of 69% to 31%. URL://www.gov/state/ak/us/ltgov/elections/elect98/results.html. The Alaska initiative is modeled on Art. XXVIII and is even more detailed and specific (see Reply Appendix). URL://www.gov/state/ak/us/ltgov/elections/1998eop/98bal6.htm.

Nor is this case plagued by "the unusual nature of . . . the underlying material facts." Priv. Opp. 30. This case is a review of a summary judgment, in which the facts are both limited and clear. Petition App. 61a. This case is well-suited for immediate consideration by this Court.

III. The Private Respondents' Historical Analysis Is Incomplete and Inaccurate.

The private Respondents, as they did in *AOE I*, spend many pages describing their view of American history as it relates to government restrictions on and use of different languages. Priv. Opp. 5-29. Petitioners responded to the essentially identical material in *AOE I*, showing that Respondents' analysis was incomplete and inaccurate. *See, e.g.*, Reply to Opposition to Petition for Writ of Certiorari in No. 95-974, 6-8.

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[3]The State Respondents suggest that the Court await another case to determine these constitutional issues. State Opp. 15-16. This case has taken ten years to proceed, and there are no other such challenges to official English declarations in either state or federal courts. *Sandoval* is a challenge to a specific program.

As Petitioners noted then, "the Founders never intended the First Amendment to permit public employees to ignore Government's chosen language." *Id.*, 6. It would have been antithetical to the Founders' beliefs, following Hobbes and Locke, that language was the major organizing principle of states and without it "there had been amongst men, neither Commonwealth, nor Society, nor Contract, nor Peace." T. Hobbes, *Leviathan*, 12 (1973 ed.). In 1780, John Adams wrote the President of Congress, arguing that just as forms of government have an influence on language, so "language in its turn influences not only the form of government, but the temper, the sentiments, and manners of the people." John Adams, *The Works of John Adams*, Vol. 7, P. 249 (Charles Francis Adams, ed., 1852).

In fact, the Founders were generally advocates for English language usage. James Wilson's, December 11, 1787, speech to the Pennsylvania Ratifying Convention, demonstrates this view:

> That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know.

Library of America, "Debates on the Constitution," (1993), Vol. I, 866. *See, also, The Federalist, No. 2* (John Jay), 94 (Benjamin F. Wright ed., 1961).

To allow an individual employee to override a democratically-made choice of language for government would have ignored the natural course of American development and invited disaster. The Founders would not have done so.

CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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